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IN THE

Supreme Court of the United States

October Term, 1958

No. 18

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., a corporation of New York, INTERNATIONAL BOXING CLUB, INC., a corporation of Illinois, MADISON SQUARE GARDEN CORPORATION, a corporation of New York, JAMES D. NORRIS, and ARTHUR M. WIRTZ,

Appellants,

—against—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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September 24, 1958

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ON APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

PRIOR OPINIONS

The opinion of the United States District Court for the Southern District of New York granting judgment for the appellee is incorporated in its findings of fact and conclusions of law, dated March 8, 1957 (R. 550-96), and is reported at 150 F. Supp. 397. The opinion indicating the scope of the relief to be granted was delivered orally June 24, 1957 (R. 890-97). It is not reported. The opinion denying appellants' motion for rehearing, dated August 27, 1957 (R. 926), is not reported.

The decree appealed from, dated July 2, 1957 (R. 906-15), is not reported.

The opinion of the Supreme Court, on a prior appeal, reversing a dismissal of the complaint and holding that the Sherman Act may apply to some aspects of professional boxing is reported at 348 U. S. 236 (1955).

JURISDICTION

This suit was brought under Section 4 of the Sherman Act to enjoin alleged violations of Sections 1 and 2 of that Act, in the conduct of professional championship boxing contests. The judgment of the District Court granting relief to the United States was entered on July 2, 1957 (R. 906-15). On July 12, 1957, the appellants made a timely motion for rehearing. This was denied August 27, 1957 (R. 926). The notice of appeal was filed in the District Court on October 14, 1957. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (15 U. S. C. § 29), as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989.

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *Schine Theatres* v. *United States*, 334 U. S. 110 (1948); *Timken Co.* v. *United States*, 341 U. S. 593 (1951).

Probable jurisdiction was noted by this Court on March 17, 1958, 356 U. S. 910 (1958) (R. 1595).

STATUTES INVOLVED

The pertinent and familiar provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. §§ 1, 2 and 4), commonly known as the Sherman Act, are printed as an appendix to this brief (p. 42).

QUESTIONS PRESENTED

The basic questions presented are:

(A) "Did appellants violate the Sherman Act between 1949 and 1953 in the conduct of professional championship boxing contests?"

(B) "If there be liability, is the decree unnecessarily punitive and in excess of that required to enforce compliance with the law?"

Stated less formally, the case presents but few questions and these reasonably simple.

The first question might well be: "Why was the suit ever brought?"

The record fails to disclose any real public interest. There was no raising of prices (R. 315) nor any other action against the public interest. On the contrary, the evidence clearly shows that the defendants vastly increased the number of professional boxing programs—those seen directly and those seen free on home television. The public was not hurt but greatly benefited by defendants' actions.

The second question: "Can the Government, for the purpose of setting up a plausible relevant market, carve out a small part of professional boxing and, during the trial, restrict the evidence of antitrust features to that market, and then for the purposes of the decree, reverse its position and undertake to control the activity of defendants in the larger market of all professional boxing where under no circumstances could the Government have proved any monopoly or restraint of trade?"

The third question: "Does the ownership of two arenas—one in Chicago and the other in New York—give to defendants such control over the promotion of boxing programs that it creates and maintains a monopoly?". Hundreds of arenas are available in all parts of the United States.

The fourth question: "Can the mere fact that the defendants promoted more championship boxing contests than others properly be the basis for an unfavorable finding against them in complete disregard of the effort, time, money and ingenuity which was applied to the promotion of boxing under their management?"

The fifth question: "Do the provisions of the decree relate to 'existing conditions' as the lower Court said they should?"

The sixth question: "What heinous offense have these defendants committed which could justify the extraordinarily punitive nature of the decree?"

At or before the complaint, lawyers and courts, including the original district judge in this very case, generally thought the antitrust laws did not apply to the complaint situation. The trial court itself said: "I don't charge them [the defendants] with malicious, intentional and moral wrongdoing." (R. 878).

Yet the relief given was far greater than that prayed for in the complaint or even asked by the plaintiff in its first-tendered order.

The District Court was not content with the usual provisions contained in paragraphs 3, 4, 5; 6, and 7 of the decree, which, among other things, prevented exclusivity as to fighters, arenas, radio and television.

The decree, as signed, included divestiture, divorcement, court-trusteed management in place of existing management of the Garden, chaperonage of future boxing activities of the Garden, financial charges against defendants and other severe and punitive provisions. Reasonable alternatives for these oppressive provisions were totally rejected.

STATEMENT OF CASE

The defendants are charged with having conspired during 1949 through 1953 to restrain and monopolize the business of promoting professional championship boxing by:

(1) an agreement with Joe Louis, retiring heavyweight champion (R. 575-9);

(2) the acquiring of the Tournament of Champions, Inc. (R. 582-5);

(3) use of their own arenas, and acquiring the exclusive right to promote for two years professional boxing contests in Yankee Stadium and the Polo Grounds (R. 585-7);

(4) although it is not mentioned in the complaint—buying a surrender of Mike Jacob's lease on Madison Square Garden (R. 581-2); and

(5) exclusive contracts with fighters (R. 587-8).

Defendants are Madison Square Garden Corporation, the owner and operator of Madison Square Garden in New York; James D. Norris and Arthur M. Wirtz, individuals; International Boxing Club of New York, Inc. [IBC (N. Y.)], a New York corporation, and International Boxing Club, Inc. [IBC (Ill.)], an Illinois corporation (R. 555-7).

Since the 1930's, Messrs. Norris and Wirtz had owned stock in Madison Square Garden. Mr. Norris' father had long been a stockholder and a director (R. 283). In 1933, they acquired stock in the Detroit Olympia Arena (R. 265). In 1935, pursuant to a court administered reorganization, they acquired stock control of the Chicago Stadium Arena (R. 265, 283, 828). In 1946 they acquired stock in the St. Louis Arena (R. 266). Neither they, nor these three latter corporations had ever promoted a prize fight, although they had been associated occasionally with, or leased an arena to a promoter of a fight (R. 276-7, 322-3). These promotions in Chicago, Detroit and St. Louis were generally unsuccessful (R. 277).

The business of operating these privately owned arenas consists primarily in obtaining, scheduling and presenting a large number of events of outstanding quality (R. 235-6, 267-8).

These events range from sports presentations like basketball, hockey, boxing, to flower shows, ice shows, circuses, rodeos, meetings, rallies and revivals (R. 226, 233-5; D. Ex. G, R. 226, 1549-70). The continuity of presentation of such events is of vital necessity for such operations and requires long range planning and scheduling of events in order to attract and maintain a substantial patronage (R. 235-6, 267). In order to meet these ends, and, indeed, to run the arena at all, the management itself must in a large number of cases, either present the events itself or directly aid and assist in the staging and publicizing of the events (R. 231-2, 240, 267-8).

Boxing programs comprise only a small part, approximately 6%, of the total program of events presented at Madison Square Garden (R. 226) and even a smaller percentage at Chicago Stadium (R. 267). In a typical year the Garden presents 240 to 250 days of events. About 105 events are Garden promotions and presentations, such as 19 days for rodeo, 35 for hockey, 19 for basketball, and 32 for boxing. About 125 events are presentations in which the Garden also actively and directly engages, such as the circus, ice show, horse show, and dog show. The remaining ten or twenty days involve use by others to whom the Garden is leased (R. 226, 231-2). By all these means the Garden made a moderate profit (R. 227-9, 237). Of the Garden's 500 employees, less than 50 engage in boxing activities (R. 238).

Chicago Stadium, on the other hand, has consistently operated at a considerable loss (R. 267-8). It had in the 1954-1955 season 121 events of which only 8 were boxing programs (R. 267).

During recent years there have been approximately 2,000 professional boxing programs each year (R. 430, 468)—a program includes 5 or 6 contests (R. 211, 296, 298)—involving approximately 20,000 boxers* (R. 218). They were

*Of course there is some duplication in this figure, as some boxers fight oftener than once a year.

presented at a large number of arenas throughout the United States (R. 272-4).

There are six principal weight divisions in which boxers compete (R. 14, 20, 27, 33). Each division has its champion. Thus the number of championship matches each year is limited (R. 205). During the years there have been approximately ten such fights each year in the six heavier weight divisions (Pl. Ex. 4A,* R. 955). During the four-year period in complaint there were about 8,000 boxing programs, involving about 44,000 fights of which only 44 were championship bouts (R. 430, Pl. Ex. 4A, R. 955-7).

In 1949, when the conspiracy is alleged to have begun, boxing was at low ebb (R. 242-3, 245, 277). It, like other forms of entertainment, had suffered greatly from the impact of television, especially the completion of the nationwide coaxial cable (R. 236-7, 270-1, 375).

The Chicago Stadium which was run by Mr. Wirtz was searching desperately for some way to build up its revenues (R. 276-7, 285, 288, 339). He became interested in the possibility of boxing, which up to that time the Stadium itself had never promoted (R. 276, 322). He had been approached by representatives of "Tournament of Champions" (R. 284-5) which had been recently formed and was operated by Columbia Broadcasting Company (R. 134-5, 183) to consider the possibility that they might jointly develop a boxing television show (R. 284). Mr. Wirtz then believed such a proposal was unacceptable because he thought it might lead to studio boxing contests and ruin boxing at the Chicago Stadium (R. 285).

The champion of the heavyweight division was Joe Louis, who was about to retire (R. 275-6, 329, 336, 414-6, 422). He wanted no more fighting but was in need of money (R.

*Plaintiff's Exhibits numbered 1 to 259 were all received into evidence, en masse, at the beginning of the trial, at folio page 311, April 19, 1956. Accordingly, when such exhibits are cited herein, the folio page where they were received in evidence is omitted.

275-6, 329, 336). His lawyer, Truman Gibson, conceived a program which involved an elimination series to produce a heavyweight champion (R. 419, 439, 449), to be under the management of Joe Louis through a corporation to be organized with him as the principal shareholder (R. 415-7, 437-8). This program was presented to several prospects unsuccessfully (R. 415, 516, 417), and was finally brought to the attention of Mr. Norris in Miami (R. 275, 316, 326, 418), who in turn referred Joe Louis's representative to Mr. Wirtz in Chicago (R. 275, 317, 326, 418). A meeting was held sometime in January of 1949 (R. 275, 420), as the result of which an arrangement was made carrying out in the main Mr. Gibson's program, giving Joe Louis an interest in the enterprise plus $150,000 which Mr. Norris and Mr. Wirtz were willing to pay him for turning over the arrangement to them (R. 436-7).

About this time Mike Jacobs, who had been promoting boxing in Madison Square Garden for many years (R. 241), being critically ill and no longer effective (R. 242, 244, 245), was persuaded by General Kilpatrick, the President of Madison Square Garden, to wind up his agreement with the Garden on payment of $20,000 a year for 5 years (R. 243, 245, Pl. Ex. 24, R. 1026-7). Mr. Wirtz had for some time tried to discuss boxing with Madison Square Garden which General Kilpatrick, in spite of the substantial stockholdings of Messrs. Norris and Wirtz in the Garden (R. 244), had refused to do (R. 246-7, 250-1, 279, 285, 288). This refusal was based upon the fact that the Garden already had an outstanding contract with Jacobs (R. 246, 251, 279, 285).

The assets of the Tournament of Champions, Columbia Broadcasting's ill-favored venture, were sold to the Garden (R. 138, 244, Pl. Ex. 38, R. 1073-5) and in July, 1949, a two year lease on the Yankee Stadium and Polo Grounds was made (R. 326, Pl. Ex. 45, R. 1122-37). It was not thereafter renewed (R. 768).

In September, 1949, when it appeared feasible to televise a Wednesday night boxing program, the first of four annual leases was entered into for the use of St. Nicholas Arena in New York (R. 325-6, Pl. Ex. 48, R. 1155) although the series did not begin until January, 1950. The last renewal expired in 1953, and was not renewed (R. 768, 770, Pl. Ex. 52, R. 1205). Currently, the arena is being used by a promoter other than the defendants for the presentation of a Monday night series of boxing programs which are televised (R. 768).

During this period there were other would be promoters—a saloon keeper (R. 155), a theatre operator (R. 181), a clothing manufacturer (R. 157, 169, 174) and a plastics manufacturer (R. 188). These were the only "promoter" witnesses tendered by the plaintiff at the trial. All were casual, part-time hobbyists in promoting boxing contests (R. 154, 170, 171, 177, 188, 343). None of these men was shown to possess the necessary financial responsibility, buildings, equipment or personnel (R. 153, 170-1, 154, 157, 178, 343). One of these men, Becker, had boxing assets which consisted only of a few pairs of 6 ounce gloves (R. 171).

In the spring of 1949, it was decided to operate the boxing activities of the Chicago Stadium and Madison Square Garden together. This made it possible to operate a Wednesday and a Friday night series of boxing programs televised, both free.* There was a large common ownership and interest (R. 283) between the two arenas and it was felt to be in the interest of both to divide the profits made on boxing programs (R. 452, 461-2, 732-3). This arrangement was a matter of public knowl-

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*In the early years of the Wednesday night series, many of the fights were televised from St. Nicholas Arena in New York (R. 375, 450). As television connections developed it became possible to televise these fights from many cities. While the Wednesday night series is sometimes spoken of as the Chicago series, and was sponsored by a Milwaukee brewer, actually only a small fraction of the fights was held in Chicago (R. 142, 267, 271, 369, 375). Also some of the Friday night fights were televised from this Arena when the Garden was otherwise occupied (R. 450, 755, 768).

edge and shareholders of Madison Square Garden, a publicly held company (R. 237-8), were fully informed (R. 757-8). There was no agreement or arrangement whatever to keep anyone else out of the promotion of boxing, championships or otherwise (R. 808, 816).

Defendants from time to time made agreements with boxers giving defendants for a period of 3 or 5 years the exclusive right to promote the fights in which these boxers engaged (see, for example, Pl. Exs. 57, 112, R. 1219, 1309). In some contracts there were the customary return-bout provisions. These contracts were patterned after those which had been in effect for many years in boxing (R. 421-2). There was nothing unusual about them (R. 314, 421). They were designed primarily to afford the defendants the certainty of regular boxing programs and a continuity of boxing presentation to the television audience which was essential (R. 691, 693) if television sponsors were to be secured. They were also designed to protect the boxers themselves. All of these exclusive contracts except one expired within a short time and at the time of the decree or shortly thereafter none of them was in effect (R. 777).

The lower court found, we think, erroneously that these activities supported the allegations of the complaint.

In the post complaint period and at the time of the decree, many significant changes had taken place in the promotion of boxing. None of the defendants any longer had any interest in Detroit Olympia (R. 771, 847, 851, 859). Boxing had been discontinued in the St. Louis Arena (R. 727). The exclusive leases on Yankee Stadium, the Polo Grounds and St. Nicholas Arena had expired and not been renewed (R. 771, 778). Another promoter was successfully staging prize fights on Monday nights in St. Nicholas Arena, which were televised in the New York area (R. 768). All the exclusive service agreements with various boxers had expired or were about to expire by their terms and no new ones had been entered

into or contemplated (R. 775-6, 779-80, 804-5, 813-4). The existing television contracts permitted the network to broadcast during the year as a part of the weekly series, a number of fights promoted by others (R. 792-3) selected by the sponsor or its agency.

In its decree the lower court ordered drastic prohibitions against defendants from making exclusive contracts either with fighters or broadcasting companies or owners of other arenas or interfering in any way with the sale of radio, television, motion picture or theatre television rights by any other promoter (R. 907-9).

In addition, the Court ordered the sale of all of the stock of Madison Square Garden which Norris and Wirtz either owned or controlled, directly or indirectly, through any other person or entity (R. 282, 860-2, 909; D. Ex. DX, R. 1577-81). This was in spite of the Court's own statement (R. 861, 862):

> "* * * I cannot place in the trusteeship stock that is not specifically specified. * * * my power in this case is limited to exercise of jurisdiction over the defendants and I may direct the defendants in this suit to dispose of stock or to take action with respect to stockholdings which are either in their own name or registered in names of corporations in which the stock ownership is entirely owned by them, or in which they have an overwhelming ownership which gives them a substantial control. * * * I must specify the stock with great particularity. I cannot make an omnibus direction . . . it would not stand up on appeal for two minutes. * * * Where I direct divestiture I must with particularity specify what property is to be divested."

The Court ordered the compulsory leasing of Madison Square Garden to other promoters on terms to be fixed by the Court (R. 912-3). It denied defendants the right to include in a contract with the champion defending his title the customary protective provision guaranteeing him a return bout

(R. 656, 675, 908), and extended this prohibition to include all professional boxing.

The Court refused to allow options usually given in divestiture situations and sanctioned by this Court in many cases such as (1) election to continue championship boxing either at Madison Square Garden or the Chicago Stadium but not at both; (2) the election of the Garden if it did not wish to dissolve the IBC to sell its stock to the highest bidder; (3) the election of Messrs. Norris and Wirtz to dispose of their stockholdings in either the Chicago Stadium or the Garden; and (4) the election to the Garden as an alternative to Messrs. Norris and Wirtz ceasing to manage the Garden affairs to give up all championship boxing there.

SUMMARY OF ARGUMENT

First: The judgment entered below was based upon a non-existent, artificial, statistical market of professional championship boxing contests. If the market had been held to be, as it properly should have been, all professional boxing, then, under the facts shown, there was not and could not have been even a contention, much less proof, of restraint of trade or monopolization.

Second: Even within the confines of the narrow market used by the District Court there was no exclusion of any boxer, promoter, arena owner or broadcaster.

Third: There was neither monopoly nor restraint of trade.

Finally: Assuming any liability, the decree is punitive and far in excess of what is necessary to bring the defendants' conduct into harmony with the law.

ARGUMENT

ON THE MERITS

FIRST: THE PROPER MARKET FOR SHERMAN ACT CONSIDERATION IN THIS ACTION IS BROADER THAN THE PROMOTION OF PROFESSIONAL CHAMPIONSHIP BOXING CONTESTS.

If the market area which was allegedly monopolized by the defendants in this case is properly all professional boxing and not just championship contests, the judgment in this case must necessarily be set aside. The case was not tried upon the theory, nor was there any finding, that the defendants controlled or restrained unreasonably any substantial portion of the approximately 2,000 boxing programs presented each year or that they prevented anyone from promoting any of these programs or that they controlled the hundreds of suitable and desirable arenas in which these fight programs could have been, and in fact were, presented, or that they controlled any substantial portion of the many available professional fighters.

Although the basic rule for the determination of the proper market area for Sherman Act consideration is clear, it is its factual application to each particular situation which presents the issue for determination. This Court has recently re-stated the rule in *United States* v. *du Pont & Co.*, 351 U. S. 377, 395 (1956) as follows:

> ". . . no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal."

When applied to this case, there can be no reasonable doubt that the "commodities", all professional boxing programs, whether championship or not, are reasonably interchangeable

by the "consumers" to wit, by the promoter, the broadcast sponsors, the arena and the public audience—for the respective purposes of each group.

The promoter, the arena operator, the broadcast sponsor and his advertising agency, the fan and the boxers themselves seek to obtain in each boxing program the most attractive and appealing contests at that particular time and at that particular place (R. 231, 299-300, 310, 312, 315, 385, 392). The primary overall goal is to obtain a regular and continuous presentation of attractive programs, week in and week out, in order to attract as wide an audience as possible to see these programs in person or through telecast (R. 147, 235, 369-70, 372-3, 397, 663, 698-9). This is also the same objective, present or ultimate, of the boxers themselves.

For one thing the very insistence by the United States on the importance of including the sale of broadcast rights in this case clearly shows that the market is not confined to championship programs alone, but rather the presentation of attractive and publicly appealing athletic entertainment (R. 146, 208, 236-7, 270-1, 374, 399, 705, 809).

The nature and use of boxing programs show that championship programs taken alone do not meet the test of a separate market expressed in *United States* v. *du Pont & Co.*, 353 U. S. 586, 593 (1957), as having "sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other" boxing programs (R. 373, 665).

The products in this case are identical—professional boxing programs presenting a number of contests, each of which has two boxers in a ring with a referee. They fight under the same rules, all under state or local regulation and protection, and they are presented to an audience personally present or listening or viewing through radio or television broadcasts and motion picture films (R. 204-5, 299-303). This physical identity of the products here would seem necessarily to put them in one and the same market. *United States* v. *du Pont & Co.*, 351 U. S. 377, 394 (1956).

Like the newspapers considered in *Times-Picayune* v. *United States*, 345 U. S. 594 (1953) professional boxing programs are dual traders in the market—with the participating audience viewing in person or through broadcasts or films and traders with an advertiser, its sponsor and the network. To either group, it is the particular public appeal of the particular boxing program which determines its marketability. It is because of this that the gross revenues of and the television ratings of different boxing programs—whether they contain a championship contest or not—vary over such a wide range (Pl. Ex. 2B, Sched. F, R. 96-7; Pl. Ex. 2D, Sched. C, R. 73; Pl. Ex. 3D, R. 937-47).

It may be claimed that the difference between a non-championship and a championship fight is that the winner of a championship fight is recognized as the best at that time in that class. The fact that the fight will give recognition to one contestant as champion is one of the factors contributing to the popular appeal of a particular boxing program. But the granting or withholding of that status is not regulated or controlled by the defendants but by the various local authorities (R. 205, 279-80).

There is no evidence in this record that any contender was, by the activities of the defendants, prevented or excluded from engaging in a contest for the championship. The local boxing authorities exercise full and complete control over the champion, and the contender, and when and how often and against whom he will risk defense of his title (R. 205, 320, 346-7, 781). The local commissions, and not the defendants, control the forfeiture of the title for failure to defend (R. 320-1).

The District Court purported to arrive at the conclusion that peculiar characteristics and uses did exist (R. 568, 593). In doing so it created a completely artificial market. The District Court did not rule on the basis of an analysis of the characteristics or uses of boxing contests, but rather on the basis

of statistical averaging of various facts concerning a vast number of non-championship programs, many of which contests necessarily involved boxers far down the line of experience, accomplishments or box office appeal (R. 593) against a necessarily limited number of championship programs. Thus from the facts that more tickets were sold, or that some were sold at a higher price, to some championship fight programs than to most non-championship fight programs (R. 567, 569); that more but not different people viewed broadcasts of some championship fight programs than viewed most non-championship fight programs (R. 567-8); that the arithmetic average of championship fight programs' income was more than the arithmetic average of income from most non-championship fight programs (R. 567); that the arithmetic average of the viewing audiences of a championship fight program was higher than non-championship fight broadcasts (R. 567-8); the District Court concluded that there was a separate, distinct and unique audience for championship fights (R. 569) and, therefore, a separate market (R. 569).

There is no evidence whatever in the record to this effect. As the Court recognized in the *Times* case, *supra*, (p. 621) ". . . economic statistics are easily susceptible to legerdemain . . ."

There is nothing to indicate that the seemingly larger audience is not the usual boxing audience as it normally would be, or that it is not composed of the same fans who make up regular audiences for non-championship fights (R. 297-8, 373, 397-8).* While more individual championship fights may have been viewed by more people than looked at most individual non-championship fights, there is no evidence that it is not entirely or substantially the very same group of fans that patronize both championship and non-championship programs.

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*A and B view the Friday night broadcast one week, B and C the next and C and D the third. On the fourth Friday there is a championship contest and A, B, C and D view it. That is not a separate audience. Any statistical study which does not take this into account is meaningless.

Nothing in the record shows the existence of a separate, distinct and substantial audience composed of people who do not see non-championship fight programs. It is upon that factual misapprehension that the error of the District Court is founded. The District Court seemed entirely to forget that the burden of establishing separateness of market was upon the plaintiff and that this burden was not carried.

This attempt to separate the market on averages of audience ratings, or dollar volumes, is, in its proper context, unrealistic and unreliable. Of the programs which contained the 44 championships under consideration in the complaint period, 33 produced less gross income than was produced by some programs which included only non-championship fights (Pl. Ex. 2B, Sched. F, R. 96-7; Pl. Ex. 2D, Sched. C, R. 73; Pl. Ex. 4A, R. 955-7).

Even if it had been shown—as it was not—that there was a separate, distinct and substantial audience that looked at championship fights but shunned non-championships, that factor is not sufficient to comprise a separate market of championship programs for Sherman Act purposes. Thus, in *Times-Picayune* v. *United States*, 345 U. S. 594 (1953), although the Court found that the New Orleans newspaper, the "Times", had a separate and distinct reader group composed of readers of the morning paper and not the evening papers, and that the "Times" solely had this separate group of readers, that the "Times" had distinct features and format, and that the "Times" dominated the New Orleans newspaper market, this Court concluded that the "Times" readers could not be excluded from the market for Sherman Act purposes in determining whether the alleged unlawful tie-in agreements were the exertion of the leverage of dominance in one market to attempt to dominate the other market. This Court looked rather to the commercial purchasers of the advertising space, and concluded the market was not separated into morning and evening reader groups. This Court said it could not so

separate the market for (p. 613): "So to conclude here would involve speculation that advertisers bought space motivated by considerations other than customer coverage; that their media selections, in effect, rested on generic qualities differentiating morning from evening readers in New Orleans." Here, likewise, the arena operator, promoter and the networks and sponsors look not to generic differences or labels but rather overall evaluations of attractiveness producing wide customer coverage.

We repeat: The facts show that the comparisons of average dollar income or the average audience ratings of a vast number of non-championship programs, against a limited number of championships, are artificial, unrealistic and unreliable, and that such comparisons cannot provide a sufficient legal basis upon which to render a cleavage of the market into two separate segments. Thus, in the *Times-Picayune* case, *supra*, the fact that the "Times" had a wider average reader coverage, or the higher average dollar income than the two evening papers together was not sufficient to sever the "Times" from the market. Nor in the *du Pont* case, 351 U. S. 377 (1956) was the fact that cellophane cost the public two to three times more than most of the other products, or that the consumer cost of many of the other products in the market ranged from ⅓ to ½ less than cellophane, or that the average dollar volume of cellophane sales was higher than other flexible wrappings, or that du Pont produced 75% of all cellophane sufficient to differentiate cellophane from the rest of the market of flexible wrapping materials.

The only proper conclusion is, upon the record—the statistical evidence, the factual analysis and the testimony—that the market in this case is "all professional boxing." In that broader and proper market there was no restraint and no monopolization.

SECOND: NO RESTRAINT OF TRADE WAS ESTABLISHED IN THE CATEGORIES LISTED BY THE GOVERNMENT:

(a) Acquisition of rights from other promoters.

(b) Agreements with certain professional boxers for their exclusive services.

(c) Use of defendants' stadia.

These comprise the specific matters which were alleged to be violations of the antitrust laws by the defendants in this case. The facts show that none of these amounts to violation of the Sherman Act.

1. There was no violation in the acquisition of interests in other promoters by some of the defendants.

The plaintiff points to the acquisition of the interests of Michael S. Jacobs with his Twentieth Century Sporting Club and to the Tournament of Champions, both in the early days of 1949, as the elimination of competitors. Both Twentieth Century and the Tournament of Champions were, at this juncture, dying organizations. None of the defendants had caused this situation. Jacobs, due to illness, had virtually ceased to promote in 1948 (R. 242-5, 333, 425). He was so ill that the agreement for the surrender of his lease bears only his mark (Pl. Ex. 24, R. 1027; Pl. Ex. 25, R. 1030). The Tournament was unsuccessful financially (R. 141, 147, 189-90, 431, 433; D. Ex. B, R. 189, 1571-2). Its principals were seeking to terminate their participation in its operation (R. 140, 148, 191). They sought out Madison Square Garden in an attempt to salvage something from a disposal of its assets (R. 140, 244, 284). Clearly, these acquisitions cannot be construed to be the elimination of competitors. They were already virtually out of business by the operation of economic forces. Such acquisitions are not violations of the antitrust law. *Internat. Shoe Co.* v. *Comm'n*, 280 U. S. 291 (1930); *Beegle* v.

Thomson, 138 F. 2d 875, 881 (7th Cir. 1943), *cert. den.* 322 U. S. 743 (1944); H. R. Rep. No. 1191, p. 6, 81st Cong., 1st Sess. (1949).

The agreements, made ancillary to these acquisitions, to the effect that the ones from whom the interests were acquired would not engage in competition, were usual and customary of agreements. The Jacobs agreement was for a ten-year period covering the United States (Pl. Ex. 25, R. 1030). In view of the unfavorable condition of the seller, it added nothing except to provide an income to a dying man (R. 245).

There was no similar agreement with Tournament of Champions. This agreement, made with CBS, was merely that for a five-year period it would acquire no interest in boxing promotions in return for first refusal of the broadcast rights on any series presentations not originating at the Garden* and one-half of any outdoor presentations (R. 138-9; Pl. Ex. 41, R. 1085-6). There is no evidence and could have been no proper finding that either of these ancillary agreements was an unreasonable restraint of trade—in scope, in area, or in time. Such agreements repeatedly have been held not to be unreasonable restraints of trade. *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *aff'd* 175 U. S. 211 (1899); *United States v. Great Lakes Towing Co.*, 208 Fed. 733, 742 (N. D. Ohio 1913).

2. There was no violation in making agreements with certain boxers requiring their exclusive services.

During the years, certain of the defendants made agreements with various boxers that if the boxer prevailed in a particular championship contest, he would engage in championship contests only under the promotion of the defendants for a period of 3 (see, for example, Pl. Ex. 57, R. 1219), and in a few cases 5, years (see, Pl. Ex. 112, R. 1309).

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*The so-called Wednesday night series began about January, 1950. It was sponsored by Pabst Brewing Company and broadcast over CBS (R. 361-2).

This type of agreement was of long use in boxing (R. 314, 421), as well as other branches of the entertainment field, where special or outstanding talents have historically been protected by exclusive service contracts. *Madison Square Garden Corporation* v. *Braddock*, 90 F. 2d 924 (3rd Cir. 1937); *Madison Square Garden Corporation, Ill.* v. *Carnera*, 52 F. 2d 47 (2nd Cir. 1931); *Zwirn* v. *Galento*, 288 N. Y. 428 (1942); see *Singer* v. *A. Hollander & Son*, 202 F. 2d 55 (3rd Cir. 1953). Such agreements were accepted and, so far as we know, never challenged or criticized.

These agreements served a legitimate business need (R. 691, 693). In order to present a series of attractive programs, to build up the required continuity of attendance or viewing habit and to fulfill the obligation to present fight programs weekly under the broadcast agreements, there was a need to have a source of outstanding boxers available whose services could be called upon for a particular program.

Most significantly, the plaintiff did not call a single boxer to testify with respect to these agreements or the practices thereunder. There is no evidence that any boxer was forced to enter into any such agreement or entered into it unwillingly,* nor evidence that any such agreement was unfair, unreasonable or unjust as to any boxer. Not a single promoter was called to testify that he was not able to secure the services of one of these fighters because he was under continuous exclusive contract to one of the defendants.** It may not be con-

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*The only possible exception is that John V. Grombach, the manager of Laurent Dauthuille, a foreign fighter, was required to post a note that in the event Dauthuille won the championship in the middleweight class he would defend it in this country rather than abroad (R. 194-8). Such an expression of patriotism is scarcely a violation of the antitrust laws.

**Becker's testimony that he offered Mr. Norris $100,000 for the opportunity to promote an Ezzard Charles-Joe Walcott fight in Cincinnati must be rejected (R. 159, 172). Apparently, despite conflicting testimony (R. 158), the conversation is supposed to have taken place in the latter part of March of 1949 (R. 290, 317) either at the Roney

cluded that there was any agreement that was an unreasonable restraint in scope, duration or area.

The rule is aptly expressed in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 239 (1918); *Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911); *United States* v. *American Tobacco Co.*, 221 U. S. 106 (1911); *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940); *United States* v. *Steel Co.*, 334 U. S. 495 (1948); *United States* v. *Twentieth Century-Fox Film Corp.*, 137 F. Supp. 78 (S. D. Cal. 1955).

3. There was no violation of the antitrust laws by the agreements for the exclusive use of certain stadia by some of the defendants for professional boxing contests.

During the four-year period under consideration in this case, IBC (N. Y.) entered into exclusive leases of three different arenas for boxing contests. One was a two-year lease, expiring in 1952, for the use of Yankee Stadium and the Polo Grounds for four fight programs a year at each of these stadia (R. 325-6; Pl. Ex. 45, R. 1122). The other consisted of a series of four one-year leases for 42 nights each year for use of the St. Nicholas Arena in New York City (R. 325-6; Pl. Exs. 48, 49, 50, 51, R. 1155, 1170, 1172, 1188). These arenas promised alternate sites for such reasonable business purposes as avoiding schedule conflicts when they arose at the Garden, or for summer events when the Garden was

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Plaza Hotel (R. 280, 292, 317) in Miami or on a train en route to Detroit (R. 292, 318). Prior to Mr. Becker's first inquiry the arrangements for the Charles-Walcott fight for Chicago had been made (R. 317, 425). Charles had already been signed for the fight (R. 424-5). The public announcements that this fight would be held in Chicago had already been made (R. 317, 424). IBC (Ill.) had already been formed to promote this match (R. 414). Messrs. Norris and Wirtz, since this was their first promotion, considered it a matter of prestige that it be held in Chicago (R. 280-1, 317, 319). In their eyes, under these circumstances, there was no price upon this particular promotion —ten cents or $300,000 (R. 319).

an inappropriate place to hold a fight. Those leases have long since expired and were never renewed.

There were other arenas or ball parks in the New York area suitable and available for the holding of professional boxing contests such as Ebbets Field (R. 768, 770), Manhattan Center arena where a television series of boxing programs was presented (R. 812), Eastern Parkway Arena in Brooklyn where a series was also presented (R. 857-8), and Roosevelt Stadium in Jersey City (R. 213).

Clearly, in such circumstances, their use of these rented arenas was reasonable and not beyond defendants' needs to the harm of anyone else.

THIRD: THE DEFENDANTS DID NOT COMBINE AND CONSPIRE TO RESTRAIN THE TRADE OF PROMOTING CHAMPIONSHIP BOXING CONTESTS NOR DID THEY COMBINE AND CONSPIRE TO MONOPOLIZE THE TRADE OF PROMOTING CHAMPIONSHIP BOXING CONTESTS.

There is no substance to any charge that the acquisitions of Jacobs' interest in the remaining two years of his lease or the assets of the Tournament of Champions eliminated any competition which had not already ceased to exist by the operation of economic forces wholly apart from any activity by any of the defendants. There was no evidence presented in or tendered to the court below of any serious or reputable promoter who was adversely affected by any activity of the defendants (R. 808, 816).

The sole "other promoters" tendered by the United States —a saloon keeper (R. 155), a theatre operator (R. 181), a clothing manufacturer (R. 157, 169, 174), and a plastics manufacturer (R. 188)—all were casual part-time hobbyists so far as promotion of boxing contests were concerned (R. 154, 170, 171, 177, 188, 343). In no instance was any one of these "promoter" witnesses precluded from promoting any

prizefight in any arena in which he desired. In such circumstances there is no evidentiary basis upon which to conclude there was an exclusion of, or an intention by the defendants to exclude, any promoter from the business. Certainly, no judgment in equity could be based on the testimony of these types of witnesses.

There can be no substance to any charge that the defendants attempted to limit or monopolize the availability of sponsors and stations to which any promoter could sell the broadcast rights. Such agreements as any of the defendants made were short term and did not exclude others from selling broadcast rights to any fight program, to any sponsor or network (R. 311, 362-3, 394, 710, 712, 718-9, 741-4, 764-5, 791-2, 802). No sponsor, network or advertising agency, and no motion picture distributor was tendered by the appellee who did or could present evidence that any of them was not able to purchase broadcast rights to boxing programs, including those having a championship boxing contest. No promoter was tendered who was prevented from selling any rights. There is no evidentiary basis to conclude that any network or sponsor or promoter was prevented from acquiring the rights to broadcast any fight program.

The challenge of the Norris-Wirtz agreement with Joe Louis as something sinister and the origin of a conspiracy is unsupportable. From Louis' standpoint, he could continue to fight until injured or defeated, or he could retire. If he retired, undoubtedly, some elimination system would have been used to determine the successor to his title, for there was no one predominant challenger. The elimination system would have been under the approval of the boxing authorities, and promoted by someone. In addition, Louis reasonably sought to provide for his future income (R. 275-6, 329, 422). He offered his plan to many before he approached Messrs. Norris and Wirtz (R. 415, 417, 419). Undoubtedly, he would have sought others had no agreement been made with them. From the standpoint

of Messrs. Norris and Wirtz, they acquired the opportunity to present three specific heavyweight fights— only one of which would be a fight in which a champion would emerge. These would be attractive presentations for the Chicago Stadium in which they were interested at a time when attendance was declining (R. 270, 285). The only conclusion is that it was a reasonable business transaction for proper and reasonable motives.

The remaining matter to which the United States pointed as an elimination of, or as evidence of intent to eliminate, competition was an assumed agreement between Messrs. Norris and Wirtz on one hand and Madison Square Garden on the other to eliminate competition between themselves by dividing the profits of championship and outdoor fights (R. 452, 461-2, 732, 757-8, 796-7). This is predicated upon an unsupportable factual assumption that the Madison Square Garden and Chicago Stadium are the usual type business competitors in commodities.

There was in fact no competition between them (R. 289). The principal market for boxing programs is New York City. The market for like entertainment in Chicago, Detroit and St. Louis is limited and insignificant (R. 322, 726-7, 758, 762, 767, 815). It is extremely doubtful whether there was in fact any competition between the operators of arenas in those cities for the opportunity to promote boxing programs either with or without a championship fight included.

Certainly as to the attending public, the degree of competition is minimal.

In addition, we submit that the agreement between Messrs. Norris, Wirtz and Joe Louis on the one hand, and the Garden, on the other, whereby Mr. Norris assumed primary responsibility for promotion and the stock of the two IBC companies was divided, constituted no violation of law, as it excluded no one from promotion, no one from boxing, no one from the rental of arenas, and no one from the sale of radio and television rights.

Upon the total view of the record in this case we submit that competition between Messrs. Norris and Wirtz on one hand and Madison Square Garden on the other in early 1949 and prior was non-existent and therefore not eliminated; that there was no elimination of competition as to, or unreasonable restraint upon, the sources of supply for boxing promotions such as attractive boxers and suitable arenas; that there was no elimination of, or unreasonable restraint imposed against, the competition of any promoter; that there was no elimination of, or unreasonable restraint imposed upon, the consumers such as the boxing fan, the radio and television advertisers, sponsors or networks; and that there was no intent to exclude or unreasonably restrain anyone. The charges of conspiracy to monopolize and conspiracy unreasonably to restrain trade must fall. They are not supported by the evidence. There was an effort by the defendants to make the boxing end of their arena business successful—nothing more.

ON THE DECREE

The District Court recognized, of course, that the ordinary function of an antitrust decree is "to pry open the market" so as to restore a competitive situation. He so stated that as his objective but the Court must have known that there had never been any real competition to restore and that no one had ever been excluded.

The court ignored completely "existing conditions". If there had been at any time a reasonable basis for a drastic decree, it did not exist at the time of the entry of the decree.

The lower court itself said (R. 774):

> "The Court . . . has always accepted evidence as to existing conditions in the industry . . . to assist the Court in determining whether or not the remedies suggested are too drastic in the light of present-day conditions—particularly where divestiture is asked. Divesti-

ture is a drastic remedy, and the Supreme Court has held repeatedly that it is a remedy that should be resorted to only where no other suitable remedy is available."

At the time of the decree among other things: Defendants owned but two arenas—one in New York and one in Chicago (R. 726-7, 766, 768, 770-1). All leases for other arenas had expired (R. 768, 771).

Defendants had no exclusive contracts with any boxer (R. 777).

The relationships with Joe Louis had been rearranged and he no longer had any interest in the two IBC's (R. 429).

The market was completely open to other promoters. Defendants had no heavyweight championship bouts in contemplation and, as a matter of information, have promoted none since. Other promoters were successfully promoting championship bouts (R. 858).

We do not think it amiss to call to the Court's attention that which is a matter of general public knowledge, Morgan, *Basic Problems of Evidence*, p. 7 (Am. L. I., 1954), namely, that during the period following the entry of the decree, the last three heavyweight championship fights have been promoted by persons who have had no connection with defendants and have been held in arenas in which the defendants have no interest. The first was a bout between Patterson and Hurricane Jackson which was held in New York City within a few days after the entry of the decree. In the last two fights no home or free television was afforded the general public and in the first the area within approximately 125 miles around New York was "blacked out".

Even if it were true that these defendants had violated the law, every objective which the court should wish to accomplish was achieved by paragraphs 3, 4, 5, 6 and 7 of the decree (R. 907-9) made applicable only to championship fights. The sections referred to prohibit exclusive contracts with fighters, re-

strict return bout provisions, prevent defendants from contracting with others for exclusive use of arenas and preclude any exclusive radio or television contracts.

The decree was harsh beyond all reason. The relief given was far greater than that asked for in the prayer of complaint although the lower court recognized that there was no need for the entry of a harsh decree. During the consideration of the decree, the court stated (R. 878):

> "I don't charge them with malicious intentional and moral wrongdoing, nor do I proceed to formulate the decree on such a basis. They are guilty, if anything, of a moral, *[malum] prohibitum* wrong which was in doubt as to whether it was even prohibitive at the time some of these acts were done, and serious doubt, but most people held it was not."

The trial court, however, was not satisfied with the completely adequate provisions of its own decree contained in paragraphs 3, 4, 5, 6, and 7, but undertook to punish the defendants with the utmost severity. Of the several punitive orders, the most unjustifiable and the most damaging was that requiring Messrs. Norris and Wirtz to sell their very large holdings of stock in Madison Square Garden (R. 909), most of which had been acquired and held for many years before the period involved in this case (R. 283).

In its zeal to restore something which had never existed, the District Court has entered a decree which is unwarranted, drastic and concerning which the District Court itself expressed grave doubt both as to the nature and extent of the relief it ordered (R. 904-5).

1. *Dissolution* (R. 913, Par. 21).

The District Court, at the hearings on relief, having initially characterized the appellee's request for dissolution of the International Boxing Clubs as unnecessary ordering of "hari kari"

(R. 650, 882), concluded later they must be dissolved (R. 896). This was sought to be justified on the grounds that they were instruments of illegality and only possessed nominal assets (R. 895-6). The Court ignored their good will and going concern value.

This relief completely failed to recognize that these corporations were organized in order to comply with boxing commission requirements of the State that a promoter be a domestic corporation (R. 274-5, 686-7). It also ignored the fact that these corporations provide convenient, appropriate and uncomplicated vehicles to comply with the requirements of local commissions, such as the filing of financial statements, accountings, fight agreements, deposits and such (R. 214-6, 301, 352, 354-5, 661). They were not designed as instruments of illegality and were not so used.

The decree had to afford the surviving defendants the opportunity to promote fights (R. 911-2). These fights must be promoted through licensed domestic corporations (R. 275, 686-7). The Court expressly recognized that both the Garden and the Chicago Stadium could have such operating subsidiaries (R. 881-2). It serves no function to put the defendants to the cost and expense of dissolving the two IBC corporations and organizing new corporations—perhaps, even under the same name. The requirement that such formal steps be taken is unrealistic and unnecessary.

We have found no case in this Court where in civil antitrust litigation the death penalty was imposed. We have found no case where the test of life and death in such litigation is the value of the assets of the defendant to be executed. The undisputed testimony at the hearings is that the ordered dissolution would not increase competition (R. 683). These provisions (R. 913-4, Pars. 21 and 22) should be struck down.

2. Divestiture (R. 909-11, Pars. 8, 9, 10, 11, 12, 13, 14).

The divestiture ordered in this case is wholly unnecessary and extremely and solely punitive. It consists, generally, in ordering Messrs. Norris and Wirtz to sell their stock in Madison Square Garden within five years to court approved persons under court approved conditions (R. 909, Par. 8). Pending such sale the stock is to be held by court appointed Trustees. The Trustees are ordered to sell within two years if the stock has not been sold within the five years granted for sale by Messrs. Norris and Wirtz (R. 909, Par. 9). The Trustees are given all rights in the stock, except retention of cash dividends and right to vote on a sale of assets or liquidation or merger without court instruction (R. 910, Par. 10). The Trustees are to be compensated and reimbursed out of such dividends for doing nothing except voting the stock and undertaking to manage an enterprise about which they know nothing (R. 911, Par. 11). Experience teaches there will be attorneys for the Trustees, Appraisers, Custodians and the like, all to be compensated out of defendants' property.

Messrs. Norris and Wirtz also are enjoined from further purchases of any interest in Madison Square Garden (R. 910, Par. 12), from voting their stock in the Corporation (R. 911, Par. 13) and are required to resign as officers and directors in thirty days from the effective date of the decree although for years they had demonstrated effectively their managerial capacity and although *all* boxing activities of the Garden comprise only about 6% of its total activities (R. 911, Par. 14).

None of defendants' stock in Madison Square Garden was acquired as a result of any law violation found by the District Court. It was acquired long prior to the formation of any alleged conspiracy. In no sense can it be considered to be the "fruits of the conspiracy." *Schine Theatres* v. *United States*, 334 U. S. 110 (1948). We have found no litigated antitrust action which ordered divestiture in such circumstances.

Indeed, the Attorney General's Committee Report states that in some 60 years of antitrust history, there are only 24 litigated cases requiring divorcement, divestiture or dissolution. (*Report*, Attorney General's National Committee to Study the Antitrust Laws, March 31, 1955, page 353). This is cited as a reflection of proper judicial restraint that has been exercised in applying the policy of this Court that: "In an equity suit, the end to be served is not punishment of past transgressions, . . ." *International Salt Co.* v. *U. S.*, 332 U. S. 392, 401 (1947). And speaking particularly of divestiture, the Court in *Timken Co.* v. *United States*, 341 U. S. 593, 603 (1951) said: "Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available." See also *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd* 347 U. S. 521 (1954). We submit that the decree here entered is in direct conflict with that expressed policy.

It is clear that the proper purpose of an antitrust decree is not to create more competitive units by divestiture, particularly when the properties ordered divested were not "acquired or used in a manner violative of the Sherman Act, except as such acquisition or use may have been incidental or related to" the agreement in violation of law. *United States* v. *National Lead Co.*, 332 U. S. 319, 351 (1947). There is no finding of fact—no scintilla of evidence that they were so acquired or used.

The decree would consign Messrs. Norris and Wirtz to the promotion of boxing in Chicago which the record shows is a losing venture (R. 268-9). But that is not all. More serious is the fact that the decree imposes other punitive sanctions not only on them but on Madison Square Garden itself. The forced sale and over-hanging trusteeship could depress not only the value of the stock of that corporation held by Messrs. Norris

and Wirtz but also the value of the stock of the other stockholders, who are not parties to this action. (The Garden and its directors recognized this in the resolution, hereinafter referred to, urgently seeking a substitute for these punitive aspects of the decree.)

Furthermore, the Garden and all its stockholders are deprived of the services of Messrs. Norris and Wirtz in connection with the wide range of Garden activities in no way associated with boxing, and they are further deprived of control and participation in the management of their investment in these activities.

In this connection it must be remembered that Messrs. Norris and Wirtz were assisting the Garden with its many activities long before they became interested in promoting boxing and that the success of the Garden in all of its activities has been dependent in large part on the ingenuity, direction and work of these two men.

No better testimony as to the hurt to the Garden and the other stockholders that would come from their separation could be given than the unanimous resolution of the other members of the Board of Directors of the Garden urging that Messrs. Norris and Wirtz should be allowed to remain with the Garden even at the cost of giving up professional championship boxing (R. 883-90; D. Ex. DDD for iden., R. 885, 1582-5).

In the context of this case, the decree provisions are tantamount to confiscation of private property under the guise of antitrust enforcement. *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, 410 (1945). It is not in accord with the policy expressed by this Court, particularly when there were and are other completely adequate and appropriate remedies available to accomplish all that the law requires.

Much of the stock which Messrs. Norris and Wirtz are charged with controlling is held by trustees for others, partnerships and various business enterprises as well as individuals (R. 282, 860-2; D. Ex. DX, R. 1577-81). The District Court never-

theless ordered that Messrs. Norris and Wirtz sell all stock they "own or control, directly or indirectly, through any person or entity" (R. 909). This clearly violates the precept that the decree must be specific, so that the defendant may specifically know what is required of him without risk of contempt. Such a decree is not in accordance with the uses of equity. It is well settled that "The decree must not be so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt . . ." *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, 410 (1945); *Schine Theatres* v. *United States*, 334 U. S. 110 (1948); *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, 433, 435-6 (1941); *Swift and Company* v. *United States*, 196 U. S. 375, 396 (1905); *International Salt Co.* v. *U. S.*, 332 U. S. 392, 400 (1947).

3. *Compulsory Leasing* (R. 912-3, Pars. 18, 19 and 20).

Upon some supposed analogy to compulsory patent licensing, or royalty-free patent licensing, in antitrust decrees, the District Court has ordered that Madison Square Garden and Chicago Stadium be subjected to compulsory leasing provisions. The decree provides that these two arenas (the only ones in which the defendants have any present interest) be leased to a rival promoter, at a rental in ultimate analysis to be fixed by the Court and that in disputes over scheduling of any two events the Court shall decide which shall prevail. Thus, if the Garden decides to hold a presentation of a non-championship program or one of the two permitted championship programs on a particular night and some other promoter wants to hold a championship program on the same night, the federal court will determine which shall be held. Such provision not only provides for direct interference with non-championship and permitted championship boxing, but it also is of such a nature that it could well cause losses to the Garden and its stockholders which could never be recouped.

The compulsory leasing provision is not even restricted to time that would otherwise be devoted to boxing. If the conflicting event was not a boxing program, the federal judge would be entering an area involving the other 94% of the activities of the Garden wholly unrelated to boxing. Such decretal provisions improperly put the District Court into the business of supervising the activities at these two important arenas. *Lorain Journal* v. *United States*, 342 U. S. 143 (1951); *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948); *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386 (1945). We submit that such continuous administrative control by a district court is burdensome, impractical and unseemly.

In the context of this case, such a decree is unwarranted and unnecessary when other means are at hand which are clear, certain and completely effective without this involvement. Such other means are involved in the options hereafter discussed.

4. *Limitation on the Number of Championship Fights* (R. 908, 911-2, Pars. 4, 16 and 17)

Under the decree as framed the defendants Messrs. Norris and Wirtz on the one hand and Madison Square Garden on the other are each restricted to the promotion of two* championship fights each year for the next five years (R. 911-2). This is in itself an adequate, definite and certain restraint against any future conduct found by the District Court to violate the antitrust laws. It completely prevents monopoly. This two-fight limitation puts the defendants under a severe economic disadvantage for any potential competitor has the privilege of bidding for all championship fights each year.

Certainly, this limitation provision in itself would be direct, complete, final and conclusive against future competitive injury

*The Government originally proposed permission for each to have three such fights each year (R. 599-600, D. Ex. DA A, R. 645, 596) but the District Court reduced the number to two.

which may be envisioned. It excludes the defendants from more than half of the anticipated championship fights and makes them compete in the open market for the others. This numerical limitation affords plaintiff full relief, if, indeed, any relief is justified. The various punitive provisions previously discussed are ostensibly to provide against monopoly and restraint. The two-fight limitation attains this result without more.

5. *Other Provisions of the Decree* (R. 907-8, Pars. 1, 4)

Strangely enough the District Court despite the affirmative undisputed testimony of the New York and Illinois Boxing Commissioners of its desirability (R. 655-6, 675), prevented a defendant from including in its contracts with a boxer for a championship fight the usual return bout provision usually insisted upon by and for the benefit of the champion who risks his title (R. 656, 675). The imposition of this restraint serves only to punish the defendants and not to increase competition. It can only serve to render very difficult any promotion by the defendants. It is positively harmful to the boxers themselves as the undisputed evidence shows. It is unnecessary and unwarranted.

Further, the District Court, contrary to the evidence (R. 660), defined "promoter" to include anyone having any interest in any fight (R. 907). The promoter is defined and licensed by the local boxing authority (R. 659, 750). In essence, he is the one who assumes the ultimate risk of profit or loss (R. 304, 398, 660, 737, 778). The term, as used in the decree, goes beyond the evidence of the Boxing Commissioners of New York and Illinois and the facts, and departs from each. It is the promotional activity as to which the Court found violation of law. This is one of the instances where the District Court drew the "liability" circle as small as it could and the "relief" circle as large as it could.

6. *Regulation of Non-Championship Promotion* (R. 907-8, 911, Pars. 3, 4, 5, and 15)

Having in the findings created by mathematics the narrow market of championship boxing, the District Court in its decree, went on to order relief which seriously interferes and hampers activity in an area in which no violation was or could be found, that is, the promotion of non-championship contests.

This interference lies primarily in paragraphs 3 and 4 of the decree (preventing exclusive service agreements with any boxers), paragraph 5 (preventing exclusive lease agreements for arenas) and paragraph 15 (enjoining joint promotion of non-championship contests by Messrs. Norris and Wirtz and the Garden) (R. 907-8, 911). These provisions effectively interfere with and render most difficult the presentation of the two weekly series which are largely composed of non-championship fights (R. 319). Assuming five to six fights each Wednesday and Friday night, we have 500 to 600 a year. Of these, under the decree only four can be championship contests. To deprive the defendants of the reasonable use of recognized and acceptable means to carry on the business of presenting boxing contests to the public and the radio and television audience in an area in which no violation of law has even been contended for by the appellee, is to evidence an intent not to restore competition, but to drive the defendants out of business. There is no showing that the other provisions of the decree require this interference which plaintiff has sedulously separated from championship boxing in ascertaining and attempting to prove liability.

7. *Options*

The defendants repeatedly requested the District Court, should it decree divestiture, to afford the defendants various options in respect thereof. Such optional provisions have been repeatedly recognized and approved in divestiture cases. *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, 426 (1945); *Hughes*

v. *United States*, 342 U. S. 353 (1952); *Besser Mfg. Co.* v. *United States*, 343 U. S. 444, 447 (1952); *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948); various decrees after remand; *Schine Theatres* v. *United States*, 334 U. S. 110 (1948); decree after remand; *U. S.* v. *Crescent Amusement Co.*, 323 U. S. 173, 188-189 (1944); *United States* v. *Imperial Chemical Industries*, 105 F. Supp. 215, 242 (1952); *United States* v. *Pullman Co.*, 53 F. Supp. 908, 909 (E. D. Pa. 1944), *aff'd per curiam*, 330 U. S. 806 (1947); *United States* v. *New England Fish Exchange*, 258 Fed. 732 (D. Mass. 1919), 292 Fed. 511 (D. Mass. 1923); *United States* v. *Lake Shore & M. S. Ry. Co.*, 203 Fed. 295 (S. D. Ohio 1912), Decrees and Judgments, Federal Anti-Trust Cases, pages 289, 306.

Particularly pertinent are the comments of the court in the *Pullman* case, 53 F. Supp. 908-909 (E. D. Pa. 1944):

> "We are equally clear, however, that the public interest does not require that the court make the choice for Pullman, Inc., as to which one of its present two businesses it shall continue to own and operate. Separation is not an end in itself; it is a means to provide an open market. * * * the court thinks that the problem what is for the best interests of the owners can well be settled by the owners themselves, whose money is invested in the enterprise. The object to be accomplished by the court's judgment is remedial, not punitive. Separation is a necessary element in the remedy. But there is no reason, in protection of the public interest, why the separation needs to be made more difficult than necessary for the defendants nor against their judgment of what is in their best interests."

The options requested were as follows:

1. That the defendants be permitted to cease championship boxing programs either at the Garden *or* at the Chicago Stadium (R. 647, 650, 652, 653);

2. That the Garden be permitted to sell the stock and business of IBC (N. Y.) to the highest bidder;

3. That Messrs. Norris and Wirtz be permitted to dispose of the stock of either the Chicago Stadium *or* of the Garden; and

4. That Madison Square Garden as a last resort be permitted to cease promoting championship boxing rather than lose the services of Messrs. Norris and Wirtz in all of its various activities (R. 883-90; D. Ex. DDD for iden., R. 885, 1582-5).

All were denied by the District Court.

The initial expression of the District Court was that it would not order Messrs. Norris and Wirtz to sell their stock in the Garden (R. 649). But when the Court wavered in this view, counsel requested the option that the Garden might cease championship boxing if the Court were to order such a sale for which the plaintiff kept pressing (R. 646, 647, 648, 650, 651-2). Near the very end of the hearings on the matter of the decree, the District Court indicated it would order divestiture (R. 878-9). The serious implications of this upon the Garden and its manifold activities apart from boxing, was apparent. The Garden Board of Directors met and determined that the best interests of the Garden required them to elect to give up championship boxing rather than lose the services of these men, who had contributed largely to the successful development and promotion of many of the numerous outstanding events wholly unrelated to boxing which were presented to fill the Garden on as many nights as possible. This action of the Board was embodied in a resolution which was offered in evidence to the Court the following day (R. 883-90; D. Ex. DDD for iden., R. 885, 1582-5). The arbitrary refusal to receive it in evidence and accept it was error (R. 885, D. Ex. DDD for iden. R. 1582-5). *United States* v. *St. Louis Terminal*, 224 U. S. 383, 409-411 (1912); *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 747 (N. D. Ohio 1913), 217 Fed. 656 (N. D. Ohio 1914), appeal dismissed,

245 U. S. 675 (1917). It was clearly relevant, and was not objected to by the government. Nor was the offer of the resolution entitled to any less consideration because it was made late in the proceedings. It was made as early as the Court's intentions were evidenced. Furthermore, there is, of course, no time limit set for the formulation of the provisions of a proper decree.

Strangely enough, the District Court refused this alternative on the ground "it would be punitive" (R. 884). It is hard to see how it would be punitive to order the elimination of only a small part of the 6% of the Garden activities but not punitive to impair more than 94% of them.

In 9 of the 24 divorcement, divestiture and dissolution actions referred to in the Attorney General's Report options were afforded by the courts. In ten other of these cases the defendants were afforded *specific* opportunity to present for consideration a plan for the accomplishment of the purposes announced by the courts. *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *United States* v. *Reading Co.*, 253 U. S. 26 (1920); *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61 (1912); *United States* v. *American Tobacco Co.*, 221 U. S. 106 (1911); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2nd Cir. 1945); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953); *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S. D. N. Y. 1916); *United States* v. *Eastman Kodak Co.*, 226 Fed. 62 (W. D. N. Y. 1915), 230 Fed. 522 (W. D. N. Y. 1916); *United States* v. *International Harvester Co.*, 214 Fed. 987 (D. Minn. 1914); *United States* v. *E. I. du Pont de Nemours & Co.*, 188 Fed. 127 (D. Del. 1911).

We submit that none of these decisions makes out as strong a case for options than does the instant case.

The decree in this case must be viewed not only in its textual provisions but in the circumstances of and the motivation of its entry. The defendants had no reason to consider that their activities, which did not begin until 1949, were unlawful. Competent lawyers and able judges, including those in this very case, thought the antitrust laws to be inapplicable to professional boxing. There was not an evil intent to violate the antitrust laws in this case. There was no moral wrong. As this Court said in *United States* v. *Gypsum Co.*, 340 U. S. 76 (1950), pp. 89-90:

> "Acts in disregard of law call for sterner measures than where the steps could reasonably have been thought permissible."

And our own District Judge said (R. 878):

> "I don't charge them with malicious intentional and moral wrongdoing, nor do I proceed to formulate the decree on such a basis. They are guilty, if anything, of a moral, [*malum*] *prohibitum* wrong which was in doubt as to whether it was even prohibitive at the time some of these acts were done, and serious doubt, but most people held it was not."

CONCLUSION

The judgment of the District Court should be reversed and judgment entered for the defendants (a) because the District Court created a market of championship boxing contests instead of considering the entire field of professional boxing which the defendants could not be and were not charged with monopolizing or restraining and (b) because even within the field of championship fights, there was no evidence of exclusion of promoters, boxers, arena owners, broadcasters or producers of motion pictures.

If contrary to these contentions it is found that some relief is justified, the decree, as entered, should be set aside as harsh

and unnecessarily punitive and the case remanded for the entry of a decree granting the defendants reasonable options and without requiring dissolution, sale or trusteeship of stock, divorcement, or resignations as officers and directors, compulsory leasing, or the regulation of non-championship boxing.

Certainly, in this first case involving professional sports, after a trial, there is no reason why the decree should be punitive or more severe than in an ordinary commercial or other traditional case.

Respectfully submitted,

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APPENDIX

Statutes Involved

Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. §§ 1, 2 and 4) are as follows:

"Section 1. Every contract, combination in the form of trust otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, . . ."

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, . . ."

"Section 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *"